

Significant Workers' Compensation Court Cases

Case summaries are taken from the Workers' Compensation Court Website: <http://wcc.dli.mt.gov>

JONATHAN LION vs. MONTANA STATE FUND 2005 MTWCC 11

Summary: The claimant successfully completed a rehabilitation plan calling for flight training leading to his certification as a flight instructor and air carrier pilot. When he could not find employment as a pilot, he petitioned the Court for further rehabilitation benefits amounting to approximately \$200,000 to allow him to gain more flying time so he could primarily seek flying contracts with the State of Montana and United States Forest Service.

Held: The request for additional benefits under section 39-71-2001, MCA (1991), is denied since (1) only one rehabilitation plan is allowed and the original plan was completed; (2) the additional benefits would exceed the 104-week limitation imposed by the section; (3) the new plan has not been certified as reasonable by any vocational provider; and (4) the claimant has not proven to the satisfaction of the Court that the new plan would result in a reasonable prospect of regular employment. Any one of the grounds is a sufficient basis for denial.

JANNA WEISGERBER vs. AMERICAN HOME ASSURANCE COMPANY 2005 MTWCC 8

Summary: The claimant seeks permanent total disability benefits on account of an occupational disease arising out of her exposure to hair dye and other aerosolized chemicals at her workplace. The claimant's primary and most significant problem is vocal cord dysfunction where her vocal cords go into spasm and constrict her breathing.

Held: The claimant's employability must take into account her preexisting disabilities at the time her occupational disease arose. Under section 39-71-609(2), MCA (2001), upon the claimant reaching maximum medical improvement and the insurer's termination of temporary total disability benefits, the insurer has the burden of producing evidence that, taking into consideration not only the claimant's disability directly attributable to her occupational disease but also other disabilities existing at the time her occupational disease arose, the claimant is qualified for and physically capable of performing regular work. The failure of the insurer to do so, along with evidence tending to indicate that the claimant is not able to do the jobs identified by the insurer, requires the Court to find the claimant to be permanently totally disabled.

ANNA SWAN vs. PACIFIC EMPLOYERS INSURANCE COMPANY
2004 MTWCC 68

Summary: The claimant suffered a non work-related low-back injury in 1998 and had surgery at her L3-L5 disk levels. She recovered from the surgery and returned to work as a nurse's aide, then suffered an additional injury to her low back. As a result of her work injury, she underwent additional surgery at the L3-S1 levels of her back. Following that surgery, her surgeon gave her a 16% whole person impairment rating. However, he also opined that she suffered an 8% impairment as a result of her 1998, non-industrial accident. Based on the latter opinion, the insurer paid only an 8% impairment award. The claimant brought the present petition for the difference between the 8% award and her 16% impairment.

Held: Where a claimant suffers an industrial injury to the same part of the body which has previously been injured, and the impairment rating for her industrial injury is a singular rating based on the part of the body rated, she is entitled to the full amount of the award without deduction for an estimate of her prior, pre-industrial injury impairment.

DEBRA STAVENJORD vs. MONTANA STATE FUND
2004 MTWCC 62

Summary: The claimant urges that the decision in this case – *Stavenjord v. State Compensation Ins. Fund*, 2001 MTWCC 25, aff'd, 2003 MT 67, 314 Mont. 466, 67 P.3d 229 – applies retroactively and seeks common fund attorney fees.

Held: *Stavenjord v. State Compensation Ins. Fund*, 2001 MTWCC 25, aff'd, 2003 MT 67, 314 Mont. 466, 67 P.3d 229, is retroactive but only to June 3, 1999. A common fund exists with respect to claimants reaching maximum medical improvement after June 3, 1999.

Note: This latest decision was stayed and appealed to the Montana Supreme Court on 9/21/04. That appeal is pending.

DOUG OTTESON vs. MONTANA STATE FUND
2004 MTWCC 44

Summary: The claimant, who is permanently totally disabled, seeks a declaratory judgment finding that he is entitled to permanent *partial* disability benefits upon becoming eligible for social security disability benefits, at which time his permanent total disability benefits will terminate.

Held: The claimant is not entitled to permanent partial disability benefits since he is not and has not been permanently partially disabled. His reliance on *Hunter v. Gibson Products of Billings Heights, Inc.*, 224 Mont. 481, 730 P.2d 1139 (1986) and *Russette v. Chippewa Cree Housing Authority*, 265 Mont. 90, 874 P.2d 1217 (1994), is misplaced.

Note: This case was appealed to the Montana Supreme Court on 6/1/04. That appeal is pending.

**LAURIE PLAIN BULL DOOR vs. MONTANA STATE FUND and UNINSURED
EMPLOYERS' FUND
2004 MTWCC 42**

Summary: Garland Victor Door, Sr. died in a work-related accident while driving truck for Warren Bell. Bell, an enrolled tribal member operating a trucking business on the Crow Reservation, had contracted to haul cattle for Smoke Signals Land and Cattle Company, LLC, a business involving Terry and Coral Langstraat, non-Native Americans, and Merle Plain Feather, an enrolled member of the Crow Tribe. The accident occurred in Carbon County, Montana, off the reservation. Since the accident occurred off the reservation, Garland Door's beneficiaries are entitled to death benefits under the Montana Workers' Compensation Act. The sole question presented is whether the Uninsured Employers' Fund is liable for those benefits since Warren Bell was uninsured, or whether the Montana State Fund, which insured Terry and Coral Langstraat, is liable under section 39-71-405, MCA (1979-2003).

Held: The Montana State Fund is liable. Smoke Signals and the Langstraats were not exempt from workers' compensation insurance requirements since their business was not confined to the Crow Reservation. § 39-71-401(1)(m), MCA (2001). Moreover, even if they were exempt from insurance requirements, section 39-71-405, MCA (1979-2003), makes them liable for benefits due an employee of a non-exempt uninsured subcontractor.

**MICHAEL O. WOODWORTH vs. LIBERTY NORTHWEST INSURANCE COMPANY
2004 MTWCC 35**

Summary: Pursuant to section 39-71-703(5)(c), MCA (1999), the claimant is seeking a ten percent permanent partial disability award for lost wages. He injured his neck on June 30, 2001, in an industrial accident and thereafter underwent a cervical discectomy and fusion. Following his surgery, he returned to work in his time-of-injury job as a millwright but was unable to work the overtime hours he had been working prior to his injury. Also, he returned to work prior to reaching maximum medical improvement (MMI). He suffered a wage loss until some ten weeks after he reached MMI. Then, approximately fifteen months later, he changed jobs because he was physically unable to continue working in his time-of-injury job. He suffered a wage loss in the new job, however, his wage loss lasted only sixteen and one-half weeks assuming his loss is measured by his wage at the time of his injury without consideration of any increases thereafter.

Held: Under section 39-71-703(5)(c), MCA (1997-2001), the claimant is entitled to a ten percent permanent partial disability award for wage loss. Where a claimant returns to work upon reaching MMI, wage loss must be measured by comparing his pre-injury wage with his average wage during the first four pay periods following MMI. In the event the claimant is able to return to his time-of-injury job and has no wage loss upon reaching MMI but thereafter is physically unable to continue working at his time-of-injury job or can only work on a reduced schedule, his wage loss must be measured at that time using the same four pay period parameter beginning at the time of his loss.

RODNEY OENS vs. EMPLOYEE BENEFITS INSURANCE COMPANY
2004 MTWCC 30

Summary: The claimant suffered a neck injury in 1983 and underwent a single-level cervical fusion in 1984. In 1985 he settled his claim on a full and final compromise basis but reserved medical benefits. Later in 1985 he experienced further neck pain and underwent a further fusion at the lower level. Shortly thereafter, he inquired about reopening his settlement but took no further action. In 1990 he suffered another injury and the insurer thereupon cut-off further medical benefits. He continued to have neck pain and returned to his 1984 treating physician who opined that his continuing problems were all attributable to the 1983 injury. In 2002 claimant underwent a further fusion at levels above his 1984 fusion. He now seeks to reopen his 1985 settlement, alleging mutual mistake of fact as to the nature and extent of his neck condition.

Held: The claim is time-barred. In 1985 the claimant was aware of facts, which are the basis for the reopening and inquired about reopening at that time. Under section 27-2-203, MCA, he was required to seek reopening within two years of his discovery of the facts upon which his request is based. He failed to do so. Moreover, he has failed to establish that there was a mutual mistake of fact. In 1984 his treating physician told him of the possibility of future problems at other levels and the insurer was aware of that potential.

RUBEN FELLENBERG vs. TRANSPORTATION INSURANCE COMPANY
2004 MTWCC 29

Summary: The claimant worked for W.R. Grace at its Libby mine until 1986 when he retired. In 1985 he was diagnosed with asbestosis and filed an occupational disease claim. At the time the disease did not preclude him from working and his subsequent retirement was not due to his disease but rather to his desire to simply retire. Over the years since his retirement, the claimant's asbestos lung disease has progressed such that he is now on occasional supplemental oxygen and limited to sedentary work. He is doing volunteer bookkeeping ten hours a week and he is able to drive, cook, shop, and do household chores even though he is short of breath. He now seeks an impairment award, permanent partial disability benefits and, in the alternative, permanent or temporary total disability benefits. Medical benefits are not at issue.

Held: The 1983 law governs the claimant's requests since that was the law in effect at the time he filed his claim. Under that law, he is not entitled to an impairment award since that award is part of permanent partial disability benefits and permanent partial disability benefits are not available under the 1983 Occupational Disease Act, at least until such time as the claimant becomes permanently totally disabled. Similarly, non-impairment permanent partial disability benefits are unavailable. Since the claimant's condition is degenerative and will never improve with any further treatment he has been at maximum medical improvement (MMI) virtually since he was diagnosed with asbestosis and is therefore not entitled to temporary total disability (TTD) benefits. As to his request for permanent total disability (PTD) benefits, he has not proven to the Court's satisfaction that he has a wage loss attributable to his disease (he voluntarily retired and removed himself from the labor market) or that he has no reasonable prospect of obtaining even sedentary jobs if he decided to return to the labor market, therefore he is not entitled to PTD benefits.

Note: This case was appealed to the Montana Supreme court and affirmed on 4/12/05.

MICHAEL E. MOSCA vs. AMERICAN HOME ASSURANCE COMPANY
2004 MTWCC 6

Summary: Claimant, a driller's helper engaged in heavy labor, woke up on a Saturday morning with extreme back and leg pain, which he thought, was caused by a bone spur on his foot. He sought medical care on Monday. On Wednesday he was diagnosed with a herniated disk (L5-S1 level). He was unable to return to work and on Friday his wife indicated to his employer that he believed his herniated disk might be work related: she provided the employer with a blank First Report of Injury form but the employer refused to fill it out and did not report any injury to its insurer. Within thirty days of his last day of work, claimant sent a written claim to the Montana Department of Labor and Industry, which passed the claim on to the insurer. The insurer denied the claim and persisted in its denial despite uncontradicted medical opinions that claimant's condition was either a work-related injury or occupational disease.

Held: The uncontroverted medical evidence shows that claimant's herniated disk was work related. In light of the lack of a specific incident related to the condition, the best medical evidence is that it occurred over time and is therefore an occupational disease. He reported as much as he knew about his condition and its cause within thirty days, therefore, his notice was timely under both the Workers' Compensation Act and the Occupational Disease Act. In light of uncontradicted evidence establishing that claimant suffered either an industrial injury or occupational disease and timely reported it, the insurer's denial of his claim was unreasonable and reprehensible.

Other Cases

There are a series of workers' compensation cases proceeding through the court system, which deal with common fund and class action requests. These cases can be tracked at: http://wcc.dli.mt.gov/common_fund_litigation.asp

Montana Supreme Court Decisions on Workers' Compensation and Occupational Disease

These decisions can be found at the State Law Library Website: www.lawlibrary.state.mt.us

DALE REESOR vs. MONTANA STATE FUND 2004 MT 370

Summary: Claimant was receiving social security retirement benefits at the time he suffered an industrial accident. He received an impairment award but was denied other permanent partial disability (PPD) benefits pursuant to section 39-71-710, MCA (1999), which provides that persons who are receiving social security benefits or are eligible for full social security retirement benefits are ineligible for PPD benefits other than an impairment award.

Held: The Supreme Court found section 39-71-710 MCA to be in violation of the Equal Protection Clause of the Montana Constitution.

MINDY VAN VLEET vs. MONTANA ASSOCIATION OF COUNTIES WORKERS' COMPENSATION TRUST 2004 MT 367

Summary: The petition in this matter arises out of the death of Shawn Van Vleet (referred to hereinafter as "decedent" or "deputy Van Vleet"). His death occurred on January 31, 2001, as a result of his fall from the fourth or fifth floor balcony of the Holiday Inn in Great Falls, Montana. At the time of his death; decedent was a Deputy Sheriff for Phillips County and attending a Montana Narcotics Officers Association conference. He was intoxicated when he fell.

Held: The Supreme Court overturned the Workers' Compensation Court in this case and found that officer Van Vleet was in the course and scope of his employment at the time of his death.

WILLIAM HARDGROVE vs. TRANSPORTATION INSURANCE COMPANY 2004 MT 340

Summary: Claimant and insurer jointly petitioned the Court for a determination as to whether the claimant's asbestosis claim is time-barred. He ceased working for W.R. Grace in 1984. At the time of his retirement section 39-72-403(3), MCA, provided that any claim for occupational disease benefits must be brought within three years after the claimant-ceased employment. The provision was repealed in 1985. In 1998 claimant was diagnosed with asbestosis resulting from his work for W.R. Grace.

Held: The Supreme Court affirmed the Workers' Compensation Court decision that the claim is time-barred.